FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1870

WHIRLPOOL CORPORATION,

Petitioner,

vs.

RAY MARSHALL, SECRETARY OF LABOR,

Respondent.

REPLY BRIEF OF PETITIONER.

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I.

THE SECRETARY'S REGULATION GOES BEYOND HIS REGULATORY AUTHORITY AND IS INCONSISTENT WITH THE STATUTORY PURPOSES.

The Secretary argues that (1) the regulation[1] is within his regulatory powers, and (2) his regulation is "consistent with the purposes of the statute" and therefore should be upheld (Resp. Brief, pp. 26-40). Neither premise is valid.

The regulation patently is *ultra vires* and will defeat the legislative purposes set forth in this balanced statute by fostering disharmony in the workplace, discouraging cooperative efforts

1. The regulation at issue is published at 29 CFR § 1977.12 and purports to interpret Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U. S. C. § 660(c)(1)).

to improve safety of working conditions, creating potential conflicts among judicial and administrative determinations, and wasting the resources of all concerned.

A. The Secretary's Regulatory Authority Is Confined to Implementation of His Own Responsibilities.

Section 11(c)(1) of the Act does not include any statement of regulatory authority.[2] The Secretary premises this regulation upon the regulatory authority granted him under Section 8 of the Act which deals with inspections and investigations. Paragraph 8(g)(2) provides:

> "The Secretary and the Secretary of Health, Education and Welfare shall each prescribe such rules and regulations as he may deem necessary *to carry out their responsibilities under this Act,* including rules and regulations dealing with the inspection of an employer's establishment.
>
> 29 U. S. C. § 657(g)(2)
> (emphasis added)

The regulation in question purports to regulate the employment relationship by offering security to employees who refuse to perform work. The regulation applies, and was applied in this case outside any intervention by the Secretary.[3] The regulation therefore does not "carry out" any relevant responsibility of the Secretary under the Act. His responsibilities, relative to hazardous conditions, are to receive and investigate complaints, report results of the investigations, and initiate legal action as he deems appropriate. 29 U. S. C. §§ 657(f), 662.[4]

2. Section 11(c)(1) provides:

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

3. The Secretary admits the Act provides no protection to an employee who stops working because of perceived hazard if normal enforcement procedures are available. 29 CFR § 1977.12(a); Resp. Brief, pp. 31-33. He argues, however, that such protections emerge whenever an OSHA inspector is not immediately available to assess allegations of imminent danger (Resp. Brief, pp. 33-36). In *this* case, however, the OSHA inspection already had been completed

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The Secretary and various Amici supporting the Secretary assert that the regulation is an attempt to fill a "gap" in the statutory scheme which Congress did not fill; they too thus recognize that the regulation is an attempt to amend the statute under guise of regulation.[5] However, in *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, at 213 (1976), dealing with the extent of an administrative agency's authority to regulate the respective rights and responsibilities of private parties, this Court observed again:

> "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law."

See also Dixon v. *United States,* 381 U. S. 68, 74 (1965); *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S.

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and the OSHA area director had been contacted well *before* the work refusal. Moreover, the Complainants returned to work the following day, and have never contacted OSHA to conduct an emergency inspection; OSHA has never sought injunctive action, and the Complainants have never sought to force such action as is their right under Section 13. In plain fact, therefore, the Secretary is contending by his actions *in this case* that the employees have a protected right to stop working regardless of opportunities to invoke relief and/or regardless whether such opportunities have ever been or will ever be invoked. It is this attempt to create a Congressionally-denied "right" to stop working *per se* which Whirlpool is challenging.

4. In addition, the Secretary has the responsibility to promulgate and enforce standards to eliminate hazards, 29 U. S. C. §§ 655, 657, and to provide education and training programs to aid employers and employees recognize, avoid and prevent hazardous conditions, 29 U. S. C. § 670(c).

5. Brief of State of Minnesota, pp. 19-21; Brief of American Public Health Association, p. 8. Like the Secretary, the Amici argue that Congress was short-sighted in believing that the Section 13 Imminent Danger procedures would be adequate to deal with such conditions.

129, 134 (1936). Compare, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U. S. 726, at 745 (1973), in which the Court observed that the general deference accorded administrative rulemaking:

> "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction. . . ."

Authorities cited by the Secretary in support of his claim to broad regulatory power are inapposite (Resp. Brief, pp. 26-27). In *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 317, n. 12 (1978), the Court merely observed that the Secretary has "broad authority to prescribe such rules and regulations as he may deem necessary *to carry out his responsibilities under the* [*Act*]" (emphasis added phrase was omitted by the Secretary). *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 211-214 (1976) and the other cases referred to therein actually support Whirlpool's position, as indicated above. *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356, 369 (1973) is completely inapposite because there the administrator had been granted by Congress unlimited authority to prescribe regulations, "as may be necessary to carry out the provisions of [the Act]." Here, the grant of authority merely to regulate as necessary to carry out the Secretary's responsibilities obviously is far narrower authority.

Section 8(g)(2) certainly is no grant of authority to define protected rights—stating, as it does, that the Secretary' regulatory authority covers only his responsibilities. The regulation thus should be rejected as being *ultra vires*.

B. The Regulation Does Not Further the Legislative Purpose.

Section 2(b) of the Act sets forth the Congressional purposes in enacting the legislation. The purposes include both Congress' objective to secure safe and healthful working conditions *and* the means by which Congress intended to achieve that

objective. A review of the legislative history reveals little opposition to legislation aimed at elimination of industrial hazards but does reveal that the various possible means to achieve that goal were hotly debated. Some proposed means—*e.g.*, procedures to set uniform national standards—ultimately were adopted; others, such as "strike with pay" and administrative shutdowns, were considered and rejected. Complainant's position that the regulation is in accord with the salutary objective of the Act fails to deal with the fact that Congress specifically decreed that the objective would not be achieved by means of encouraging employees to stop working, but would be achieved by other means; *i.e.*:

> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
>
> (2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
>
> (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;
>
> (4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;
>
> (5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U. S. C. § 651(b)(1)-(13)

As can be seen, the legislative purpose, expressed in the statute, plainly does not include any suggestion that Congress' goal was to be achieved by affording legal protection to employees who refuse to work. While one of Congress' purposes was to provide:

> "that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;"
>
> 29 U. S. C. § 651(b)(2)

Congress was careful to prescribe precisely what those responsibilities and rights were to be relative to imminent dangers. Congress engaged in extensive debate on that topic (Pet. Brief, pp. 21-34; Amicus Brief for Chamber of Commerce, pp. 19-25) and considered bills proposing a range of procedures including strikes with pay and administrative shutdown orders. What is now found in Sections 8(f)(1)[6] and 13 of the Act emerged from that debate as final resolution of the question.[7]

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6. U. S. C. §§ 657(f)(1).

7. 29 U. S. C. § 662 (titled, "Procedures to Counteract Imminent Dangers"). Contrary to the Secretary's representation, Whirlpool does not argue that the Section 11(c) antidiscrimination protections do not protect employees from disciplinary action taken because of exercise of the stated right to initiate or participate in OSHA investigations of imminent dangers. Therefore, the Secretary's reliance on opinions such as *NLRB* v. *Scrivener*, 405 U. S. 117 (1972) are misdirected. Compare, *Davis* v. *Boise Cascade Corp.*, ... N. W. 2d ..... (Minnesota Supreme Court No. 49660, Dec. 7, 1979) cited by Amicus State of Minnesota (Amicus Brief, p. 5, footnote 8) and said to hold that a work stoppage unrelated to initiation of enforcement procedures would be deemed unprotected. In this case, however, the regulation was applied to a work refusal *per se*, without regard to implementations of the Secretary's procedures. In fact,

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Because the Section 13 procedures exist and because they were enacted as a compromise of extreme positions including that of protecting work refusals, it is untenable to suggest that Congress' purpose included a conveyance of authority to the Secretary by regulation to protect work stoppages as a means to counter imminent dangers—indeed, as the Secretary would have it, an "implied authority" to recognize an "implied right." Respondent's position simply rests on too many implications in the face of an express and detailed statement of a contrary Congressional purpose to deal with imminent dangers via prompt investigation and judicial process.

The regulation is thus not supported by the statement of purposes and quite clearly is an attempt by the Secretary to expand upon the means ultimately chosen by Congress to achieve its legislative goal. It is inconsistent with those means chosen by Congress—as shown at least by the fact that Congress rejected it during deliberations on the statute—and inconsistent with the reality that industrial strife is not the best way to achieve safe and healthful working conditions. This Court noted in *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368 at 379 (1974):

> "Relegating safety disputes to the arena of economic combat offers no assurance that the ultimate resolution will ensure employee safety."

Congress, in accord with the *Gateway* rationale that safety questions ought to be resolved by means other than industrial combat, determined in the context of OSHA that such questions be

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OSHA had been contacted and had investigated, and had determined not to obtain a court injunction *before* the work refusal had occurred. The Complainants have never to this day filed anything with OSHA other than their complaint of discrimination. The Secretary is therefore not being completely candid in protesting that his regulation merely fills a gap in the statutory procedures to counter imminent dangers. He is really talking about protecting work refusals *per se*, and that is precisely what was rejected by Congress.

resolved via Section 13 procedures and not by holding out to employees the prospect of being paid for not working.

Congress' ultimate purpose in connection with "imminent dangers" not susceptible to timely correction through the statutory enforcement procedures was to create means—Sections 8(f) and 13—by which employees may get the Secretary into the situation quickly. If the Secretary would implement regulations to carry out his responsibilities under the Act, in accord with the Congressional intent and purpose vis-a-vis imminent dangers, he should promulgate regulations aimed at facilitating employee notification, and involving his officers in such situations quickly, rather than promulgating an employee job security regulation which has the effect of circumventing the Secretary's responsibilities altogether.[8]

In December, 1978, a Presidential Task Force issued a report titled "Making Prevention Pay—Final Report of the Interagency Task Force on Workplace Safety and Health" which critiqued the performance of OSHA. After finding little evidence that OSHA has had any impact in achieving the Congressional goal significantly to reduce workplace injuries (Report, pp. II-3/6, Tables II-1, II-2) the Task Force strongly recommended, *inter alia*, that OSHA stop fostering labor-management controversy and attempt to foster a consensus-oriented constituency in support of its program among labor, management and the general public (Report, pp. II-12, V-1/19, VIII-1/5) *and make more efficient use of its resources* (Report, II-7/14).

Significantly, the Secretary himself was Co-chairman of the Task Force (Report, p. iv).

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8. For example, he could promulgate regulations which would facilitate efficient communication between employees and his officers, *e.g.*, by creating a 24-hour "hot line" staffed by professional safety and health personnel authorized to make evaluation of "imminent danger" notifications, dispatch field personnel as necessary, and/or notify counsel to commence Section 13 proceedings—rather than regulating new rights to conduct protected work stoppages.

C. The Practical Effect of the Regulation Is to Defeat Congressional Intent.

The statute represents a balanced approach to the problem of correcting unsafe industrial conditions by fostering research and cooperative efforts among employees, employers and the government aimed at that end, within the framework of a detailed enforcement scheme which makes provision for imminent dangers. The regulation, however, merely encourages industrial discord by holding out to employees the prospect of being paid for refusing to work.[9] It potentially has the effect of discouraging corrective measures because it establishes bases for extensive federal court litigation over employee job security, disciplinary matters, and other disputes between employees and supervision wherein the contending parties' positions necessarily must be polarized on the issue whether hazards exist.

In addition, the litigation which this regulation encourages and has encouraged, while extensive, will never be fully conclusive. Results of such litigation will turn on questions of individual attitude, intent and perception at particular points in time. As this case shows, those questions are subject to variation in the dynamic context of working relationships. A determination that the Complainant's perception of danger was justified on July 10, 1974, for example, cannot say much about their perceptions the following day, or the actual hazards.

Since the ultimate objects of the litigation which this regulation encourages are resolution of disciplinary action, back pay

9. The Secretary's claim that the regulation does not set up a strike with pay situation is nonsense; the Secretary takes pains to qualify his position always with the point that an employer need not pay his work-stopping employee if alternate work which the employee is willing to perform is not available. Very little industrial relations sophistication is needed to see that the qualification will nearly always apply. Moreover, since the regulation is based upon employee perceptions of danger and adequacy of corrective measures rather than the facts of such matters (as this case so clearly demonstrates) the question is not susceptible of any certain or final resolution.

and job retention, rather than the safety-status of working conditions, the litigation will be counterproductive of Congress' purpose. Thus, even if a potentially hazardous condition in fact is susceptible to further correction, an employer worried about the back pay litigation may be tempted not to take further corrective measures out of fear that a court might, at the suggestion of the Secretary, misconstrue such action as representing agreement that the condition at the time of the work refusal was "imminently" hazardous.[10] Conversely, even if a condition is not in fact hazardous, an employer faced with a work refusal based on perceptions or claims of perception made by an employee may be encouraged to divert his attention and resources away from conditions which are in fact hazardous in order to avoid litigation.

These possibilities, which clearly are enhanced by this regulation, should be contrasted with the litigation setting contemplated by Sections 9, 10 and 13 of the Act, by which the attention of the parties and the decision makers is focused exclusively on the existence or non-existence of a hazard and/or corrective measures required.

The Secretary points out that Congress understood, or may be presumed to have understood, that employees have protected rights to strike over safety issues under other labor legislation (Resp. Brief, pp. 45-46). The inescapable conclusion to be drawn from this point, however, is that Congress intended to leave the exercise of such rights to be regulated by means provided by such other legislation; it did not intend that the Secretary would be using safety program resources to litigate in the federal courts over a plethora of industrial discipline disputes.[11]

10. Compare, *Diebold, Incorporated* v. *Marshall, Secretary of Labor et al.*, 585 F. 2d 1327 (6th Cir. 1978) wherein the Secretary urged the court to view an employer's safety-hazard research efforts as an "admission" that existing conditions were unsafe in violation of the Act. 585 F. 2d at pp. 1337-38.

11. Admittedly, Section 11(c) does block discipline or other discrimination which interferes with employee rights to exercise the

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D. The Secretary Misstates the Regulation's Impact Upon Employee Assistance in Enforcing the Act.

The Secretary asserts that the regulation is essential to implement his investigative and enforcement responsibilities; *i.e.*:

> "Because of the shortage of investigators and the unpredictability of imminent dangers, the Secretary must rely on information provided by employees." (Resp. Brief, p. 17.)

Accordingly, so the argument goes, work refusals must be protected under Section 11(c)(1) so that "channels of communication" between employees and OSHA will not be closed through "employer intimidation" (Resp. Brief, pp. 17-18.)

The argument is a *non sequitur*. The regulation in fact has the opposite effect upon employee participation in the statutory investigative and enforcement procedures. Section 8(f)(1) expressly states that employees must notify the Secretary whenever an imminent danger is believed to exist. This section provides clear statutory protection to the maintenance of open "channels of communication" between employees and the Secretary and assures that the antidiscrimination provisions of Section 11(c) will be available to any employee allegedly subjected to "employer intimidation." As demonstrated by this case, an employee is under no obligation whatsoever to attempt to contact the Secretary prior to engaging in a work refusal said to be protected by terms of the regulation; rather, there need only be:

> "[I]nsufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels." 1977.12(b)(2).[12]

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statutory procedures. The regulation, however, goes far beyond that purpose by purporting to recognize a right to circumvent the statute and resort to self-help.

12. Note that the language of the regulation is essentially the same as that used by Congress in Section 13, wherein the District Courts are authorized to restrain conditions or practices

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Therefore, it is obvious that the regulation may well close the channels of communication which the Secretary seeks to preserve and thereby tear the heart from Section 8(f)(1) which establishes employee notification to the Secretary as the crucial first step in triggering imminent danger inspections. The Secretary would be well advised to improve the efficiency[13] of his enforcement staff instead of promulgating regulations which destroy the statute's enforcement procedures.

E. The Regulation Is Too Ambiguous to Be Accorded Any Weight in the Interpretation of the Statute.

The Secretary argues that his interpretation of the phrase, "any right afforded by the Act," should be followed because he is charged with execution of the Act and because his interpretation was made contemporaneously with passage of the Act.[14] The rule expressed by cases cited in support of this proposition[15] is not, however, unequivocal. This Court has held:

> "The familiar principle is invoked that great weight is attached to the construction consistently given to a statute

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> "which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately, or before the imminance of such danger can be eliminated through enforcement procedures otherwise provided by this Act."
>
> 29 U. S. C. § 662(a).

The contrast and inconsistency between Congress' choice of means (court action) and the regulation (work stoppages) is obvious.

13. See footnote 8, *supra,* at p. 9.

14. The Secretary's claim that his interpretation was contemporaneous with passage of the Act stretches the term. His regulation was published in January, 1973, more than two years after enactment of the legislation.

15. The Secretary principally relies upon *Red Lion Broadcasting* v. *FCC,* 395 U. S. 367 (1969) to support his position that the Court ought to defer to his authority. In that case there had been 30 years of consistent administrative construction, followed by express Congressional ratification of that construction. Thus, the case is inapposite.

> by the executive department charged with its administration. . . . But the qualification of that principle is as well established as the principle itself. The court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons. . . . Moreover, *ambiguous regulations are of little value in resolving statutory ambiguities.* . . ."
>
> *Burnet* v. *Chicago Portrait Company*, 285 U. S. 1, at 16 (1932) (emphasis added; citations omitted)

The Secretary's regulation must be examined with that holding in mind.

The Secretary says first that a review of the Act and its legislative history reveals that it affords no right to walk off the job because of "potential unsafe conditions," or "if there is a dispute about the existence of a hazard," and that an employer "ordinarily" would be free to impose discipline for refusing to work because of "alleged" hazards. 29 CFR § 1977.12(a). In the next breath, however, the Secretary postulates circumstances which "might" give rise to protected work refusals. In describing such circumstances, the Secretary uses the terms "reasonable alternatives," "good faith," "real danger," "insufficient time" and "unable to obtain correction." 29 CFR § 1977.12(b).

For example, as has been noted, most employers certainly will correct, or attempt to correct, "imminent dangers" when notified of same. But there often will continue to be disagreement over the need for and nature and adequacy of the correction (as the record of this case amply demonstrates[16] and as is demonstrated by the many volumes of decisions issued by the Review Commission since its relatively recent creation).

16. See footnote 23, *infra*. As indicated there, the OSH Review Commission and its Judge issued four opinions over five years and ultimately disagreed with both Whirlpool and the Secretary on the question of alleged hazard and correction.

Correction of hazards, moreover, is just one of a number of such ambiguities upon which the Secretary's regulation hinges. The regulation, if upheld, thus will foster abundant federal court litigation as the contending parties seek to apply its multi-ambiguous terms to the infinite number of workplace situations extant within the Nation's complex industrial plant.

Examination of the "Purposes" section of the Act (29 U. S. C. § 651, quoted pp. 5-7, *supra*) discloses no basis whatsoever for assuming that it was Congress' purpose to foster extensive federal court litigation over the legitimacy of work stoppages in order to achieve its legislative goal. Indeed, as discussed in our principal brief, the legislative history demonstrates that Congress expressly considered and expressly rejected a clearly proposed legislative choice to include protected work stoppages as a means to correct unsafe conditions.

The regulation therefore should be given no weight by this Court in its interpretation of the Act, because:

a) the Act is unambiguous in light of legislative history, and thus requires no regulatory interpretation;

b) the regulation in any event is far more ambiguous than the Act itself; and

c) the very fact that the regulation is so ambiguous and will be the basis for unending disputes and litigation, runs diametrically counter to the Congressional purpose to achieve safety and health goals by fostering cooperation between employers, employees, and the government.

F. The Secretary's Reliance on Section 5(a)(1) of the Act Is Misplaced.

The Secretary's contention that Section 5(a)(1) of the Act (29 U. S. C. § 654(a)(1))[17] creates a right enforceable through

17. "Each employer—
(1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;"

the antidiscrimination provisions is misleading and misplaced. It ignores the statutory scheme.

Congress provided employees with a right to call upon the Secretary to conduct inspections when reason exists to believe that a standard or provision of the Act is being violated in their workplace, or that an imminent danger exists, 29 U. S. C. § 567 (f). Congress further provided an enforcement scheme which (a) authorizes the Secretary to issue citations and proposed penalties for such violations as may be found, and (b) authorizes the Secretary to invoke the equitable powers of Federal District Courts in cases where he finds dangers to exist:

> "[W]hich could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."
>
> 29 U. S. C. § 662.

The "enforcement procedures otherwise provided by this Act" are set forth in Section 10 under the heading, "Procedure for Enforcement" 29 U. S. C. § 659, which provides for review and enforcement of citations by an independent adjudicative body, the Occupational Safety and Health Review Commission.

The employee's expressly stated statutory remedy for alleged violation of Section 5(a)(1) thus is to invoke the Secretary's investigatory and discretionary responsibilities by filing a complaint with him, and, in turn, participating in the enforcement procedure chosen by the Secretary (*i.e.*, Sections 9 and 10, or Section 13). As this Court held in *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U. S. 453 at p. 458 (1974):

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode,"

unless a contrary legislative intent is demonstrated. Here, of course, the legislative history shows clearly an intent not to protect work refusals as a mode of enforcing employer obligations. Moreover, the fact that Congress expressly protected employees from discrimination because of filing complaints, and expressly required the Secretary swiftly to act upon them, absolutely belies any intent to encourage employees to ignore the statutory procedures with the promise of pay for no work, or an intent to relieve the Secretary of his responsibilities in that manner, or to set up potential for conflict between decisions of courts ruling on controversies over the existence of Section 5 (a)(1) conditions in the context of discrimination lawsuits and decisions of the OSH Review Commission on the same issues.

Finally, the Secretary's view that the Section 11(c) term "any right" includes a protected right to withdraw from work assignments without regard to the usual employment consequences requires one to disregard the familiar principle of statutory construction known historically as *ejusdem generis,* which:

> "[C]ounsels courts to construe the act in light of the narrow, in common sense recognition that general and specific words, when present together, are associated with and take color from each other."
>
> *United States* v. *Insco,* 496 F. 2d 204, 206 (5th Cir. 1974)

Here, it is made plain by the legislative history and by the existence of express provisions for imminent dangers, that the Section 11(c) term in question, "any right," must be construed as reflective of the type of rights expressly referred to in Section 11(c)—*e.g.*, filing complaints, testifying, and assisting the Secretary in the conduct of inspections.

II.

THE SECRETARY MISCONSTRUES THE LEGISLATIVE HISTORY OF THE ACT IN ARGUING THAT CONGRESS DID NOT INTEND TO EXCLUDE WORK REFUSALS FROM EMPLOYEE RIGHTS PROTECTED BY THE ACT.

The Secretary emotionally contends that Congress "could not have desired to put employees to the choice" (Resp. Brief,

p. 50). The Secretary's characterization is misleading. Whirlpool never has suggested that Congress affirmatively decided to place any employees in peril. Congress did, however, affirmatively choose one legislative method (notice to Secretary, and injunctive action) and rejected others (strike with pay and/or administrative shutdowns) to deal with the matter of imminent dangers. The legislative history (Pet. Brief, pp. 21-36) establishes that both houses of Congress rejected entirely and categorically all proposals to protect work refusals.

Statements made by sponsors of the legislation clearly show a *conscious* intent to deal with imminent dangers via the Section 13 Imminent Danger provisions and not by protecting refusals to work:

> " 'Third, we have deleted a provision which was—though inaccurately—called a "strike with pay" provision and have provided that employees may request an inspection when they are subjected to dangers at the workplace.' . . . 116 Cong. Rec. 38707, Leg. Hist. at 1071. (Representative Daniels.)
>
> * * * * *
>
> " 'Let me emphasize again, there is nothing in our bill which authorized strikes without pay.' . . . 116 Cong. Rec. 38708, Leg. Hist. at 107[5]. (Representative Steiger.)
>
> * * * * *
>
> " 'The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.' " 116 Cong. Rec. 37340-41, Leg. Hist. at 432. (Senator Williams.)

The Secretary ignores these clear and unambiguous statements made by the sponsors[18] of safety legislation in the Con-

18. As *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U. S. 584 at p. 564 (1976) and the opinions cited therein hold, sponsors' statements should be given substantial weight in assessing Congressional intent; this rule is especially applicable in determining

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gressional debate in arguing that Congress merely intended to "delete any requirement that employees who absent themselves from risk of harm be *paid* by their employers when doing so" (Resp. Brief, p. 58). Notwithstanding Respondent's protestations to the contrary, the legislative history is replete with evidence that Congress intended to require employees to "get the Secretary into the situation quickly" by requesting inspections pursuant to Section 13(d) in those instances "where they believe . . . that an imminent danger exists."

The Secretary's only answers to the legislative history rely on the fact that the rejected strike with pay proposition originated within a less than generally applicable context (Resp. Brief, pp. 19-20, 52-62), and would have introduced what even the Secretary describes as being a "novel proposition in federal labor legislation" (Resp. Brief, p. 19) which the Secretary is not implying by his regulation; he also notes that the rejected administrative shutdown proposals were directed at governmental rather than employee action (Resp. Brief, pp. 20, 62-70).

Those arguments fall short of the issue, however. The issue is whether or not Congress intended that imminent dangers be dealt with by means other than (a) the citation/penalty/abatement procedures set forth in Sections 9 and 10 of the Act, or (b) the imminent danger procedures set forth in Sections 8(f) and 13 of the Act. Congress' intent is absolutely clear. It rejected categorically all proposals which would effectively encourage work stoppages as means to deal with hazards. It rejected proposals offering even a limited work refusal protection to employees[19] as well as proposals which would have generated

(Footnote continued from preceding page.)

Congressional intent relative to the means by which the overall objective would be achieved, since it was the method, not the object, which produced controversy. Compare, *Wirtz* v. *Local 153, Glass Bottle Blowers' Ass'n.*, 389 U. S. 463 at p. 468 (1968).

19. The Secretary fails to explain how Congressional rejection of a limited right to quit work implies an intent or purpose to create a more extensive right as is reflected by the regulation.

any possibility of administrative shutdown orders sparked by undue employee or union influence upon the bureaucracy.

When one considers the course of this five-year old litigation over the issuance of a disciplinary warning and four hours' lost pay, and considers the probability that such litigation will proliferate if this ambiguous regulation is upheld, as well as Congress' rejection of strike with pay and administrative shutdowns as means to deal with imminent hazards, it should be clear that Congress did not intend that this Act would be used as a basis for adjusting labor-management disputes, other than as necessary to ensure the integrity of the enforcement processes and employee participation therein.

The Secretary's reliance upon the 1977 Amendments to the Federal Coal Mine Safety and Health Act, 30 U. S. C. 801 *et seq.* (Resp. Brief, p. 49) also is misplaced. The legislative history of the 1977 Amendments indicates that Congress intended that miners would continue to have rights provided under earlier legislation as construed by certain decisions of the District of Columbia Circuit Court of Appeals in *Munsey* v. *Morton*, 507 F. 2d 1202 (D. C. Cir. 1974) and *Phillips* v. *Dept. of Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975).

As the Fifth Circuit pointed out in rejecting the Secretary's position, *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707, 715 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (1978), the *Phillips* court held that the antidiscrimination provision in the earlier Coal Mine Safety and Health Act prohibited an employer from discharging an employee who had notified his foreman or authorized safety committeeman of possible safety violations in the employer's mine. The court held the employee's activity to be protected because it constituted the initial step in an internal review procedure agreed upon by the employer and the employee's union representative for processing employee safety complaints under the Coal Mine and Safety and Health Act. 500 F. 2d at 779-81.

Similarly, in *Munsey*, the Court held that:

> "The end and aim of Section 110(b)(1) [the antidiscrimination provision of the 1969 Mine Safety Act] was the protection of miners against retaliation by mine operators prompted by a miner's complaint to the Secretary. . . ."
>
> 507 F. 2d at 1202

The instant regulation is not, however, premised upon any effort to assure integrity of a complaint procedure. The sole basis for the Secretary's complaint here is that Messrs. Deemer and Cornwell allegedly were disciplined for refusing to work because they felt hazardous conditions existed,[20] not because they had contacted the Secretary.

The comments made at the time of the 1977 Amendments to the Coal Mine Safety and Health Act must be viewed in light of the particular problems facing the mining industry and the broad scope which Congress intended that legislation to have. The legislative history of OSHA, on the other hand, reveals that Congress expressly decided to reject this broad-based right to refuse work in favor of the statutory enforcement procedures whereby employees contact the Secretary.[21]

20. Moreover, the construction the Secretary would have the Court adopt in this case would go well beyond the court's holding in *Phillips*. It is important to note that the *Phillips* majority did not disagree with the dissent's remark that "the purpose of section 110 (b)(1) is to protect the integrity of the agency's investigative procedure by assuring that a miner who complained to the agency would not be penalized." 500 F. 2d at 786. Instead, the majority merely held that the employee was protected because he had made his complaint to the agency in the manner his union and the employer had agreed upon.

21. It is noteworthy that at the time of the 1977 Amendments to the Coal Mine Safety and Health Act several courts (including one court of appeals) had ruled that employees do not have the right to refuse work assignments under OSHA. *Marshall* v. *Daniel Construction Company*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (1978); *Alders* v. *Kennecott Copper Corp.*, ... F. Supp. ....., No. 76-292-M (D. N. M. 1976); *Brennan* v. *Diamond International Corp.*, ... F. Supp. ....., 5

(Footnote continued on next page.)

III.

THE SECRETARY'S LEGAL ARGUMENTS ARE INCONSISTENT WITH HIS ACTIONS IN THIS CASE.

In response to Whirlpool's arguments that the regulation has potential for upsetting industrial procedures regulated by other laws, is inconsistent with the legislative history of the Act, and defeats the Congressional purpose, the Secretary argues that his regulation is "carefully circumscribed" to fill only a narrow procedural gap in the Act. Yet, the Secretary is arguing the validity of his regulation in the context of a case wherein the refused work assignment was identical to assignments which regularly had been carried out by the Complainants and numerous other employees for years; ample time and opportunity existed to invoke the statutory procedures as shown by the facts:[22]

1. The statute had been in effect for more than three years;
2. An OSHA inspector had conducted a thorough inspection of the plant work areas in February, 1974, in company with an employee walkaround representative who had frequently worked on the guardscreen;

(Footnote continued from preceding page.)
OSHC 1049 (BNA S. D. Ohio 1976); *Brennan* v. *Empire-Detroit Steel Division, Detroit Steel Corp.*, ... F. Supp. ....., No. C-1-74-345 (S. D. Ohio 1976), *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979); *Usery* v. *Whirlpool Corporation*, 416 F. Supp. 30 (N. D. Ohio 1976); *rev'd sub nom., Marshall* v. *Whirlpool Corporation and Empire-Detroit Steel Division, Detroit Steel Corp.*, 593 F. 2d 715 (6th Cir. 1979), *cert. granted*, 48 U. S. L. W. 3188 (1979). Congress' failure to comment adversely on these decisions indicates that it did not intend to extend this right to employees covered by OSHA.

22. See brief of Petitioner, pp. 6-7.

3. The screen was inspected by an OSHA inspector ten days prior to the work refusal, in connection with the accident investigation;[23]
4. The complaining witnesses had contacted OSHA a full day prior to their refusal (OSHA did not initiate any procedures to enjoin guard screen work).
5. Prior to the refusal, the guard screen areas had been inspected jointly by the Complainants and their supervisor;[24] the supervisor personally tested the screen by walking on it; and
6. At trial, both Complainants admitted they refused the job because they were "mad" and, upon reflection, were not actually opposed *per se* to performing the job.

Accordingly, and despite what the Secretary says about the intent behind his regulation, the facts make clear his intent to extend protections of the Act to any work refusal accompanied by a claim of safety hazard regardless of opportunity to invoke statutory procedures, and regardless of any contemporaneous action or inaction by the Secretary or the employer. It is, in short, an attempt to create a right wholly divorced from the statutory means adopted by Congress to implement its legislative objective.

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23. That inspector told Whirlpool management that the accident resulted from a "mechanical malfunction" and not from any inherent screen deficiency. Admittedly, the OSHA Director later (after the work refusal) issued a citation critical of the screen and directing "immediate" correction. The OSH Review Commission upheld the citation five years later but found no evidence of a statutory violation in connection with the accident and extended the correction period from "immediate" to "six months after date of its order." This action by the forum entrusted with adjudicatory responsibilities under the Act patently belies any thought that the screen constituted any type of "imminent danger."

24. As stated in our principal brief, the screen was tested by independent engineers and was found fully capable of supporting weights far in excess of those which would have been applied by the Complainants.

CONCLUSION.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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